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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No._____

OSCAR HOLCOMBE, MAYOR OF THE CITY OF HOUSTON, ET AL., *Petitioners,*

VERSUS

A. W. BEAL, ET AL., *Respondents*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on December 20, 1951, with the Petition for Rehearing denied on March 8, 1952.

Opinion Below

The opinion of the Court of Appeals, now being brought before this Court, is reported at 193 F. 2d 384, and appears at Page 93 et seq. of the record herein.

(The opinion of the District Court, which the Court of Appeals reversed, is reported at 103 Fed. Sup. 218, and appears at Page 52 et seq. of the record herein.)

Jurisdiction

Judgment was entered on December 20, 1951 by the United States Court of Appeals for the Fifth Circuit (R. 101). The Order denying the Petition for Rehearing was entered by the Court of Appeals on March 8, 1952 (R. 106). The jurisdiction of this Court is invoked under Title 28, UNITED STATES CODE, Section 1254.

Statement

The City of Houston sponsors and maintains recreational activities in nineteen parks, and has recently acquired sites for two more. In addition, the City supervises similar activities at four public housing projects. Four of the parks are used by negroes, and two of the public housing projects are occupied by negroes. The municipal golf courses involved in this suit are situated in Hermann Park, Memorial Park, and Glenbrook Park, respectively, which parks are reserved for the use of white residents.

A. W. Beal and others brought suit in the United States District Court for the Southern District of Texas, against the petitioners in this Court, praying for a declaratory judgment, a permanent injunction, and that a municipal ordinance *and a State statute* be declared unconstitutional, because they had been refused admission to the municipal golf courses named above. Such refusal by petitioners was based upon Article 1015b, TEX. REV. CIV. STAT. (Vernon, 1942) and upon an ordinance enacted pursuant to such statute.

The district court found against the plaintiffs below on the matter of discrimination, and ruled that the request of the defendants in the trial court for a three-judge court should be denied. The plaintiff below then appealed to the United States Court of Appeals for the Fifth Circuit where the cause was reversed and remanded with directions to enter a judgment as stated in the opinion. The petitioners in this Court filed a Petition for Rehearing before the Court of Appeals for the Fifth Circuit, which was denied.

The Questions Presented

I.

A statute of the State of Texas has conferred power on cities to provide for the segregation of the races. The question is whether city officials, under that statute, may exercise reasonable discretion and judgment in providing public recreational facilities of substantial equality to all races in such manner that such facilities may best serve *all* of the public or whether the public policy, so expressed, must be overridden so that certain indivduals may play at one game.

II.

The respondents attacked the constitutionality of a State statute in their complaint. The acts of city officials in enforcing segregation must have been by virtue of that State authority or under its color or otherwise no federal jurisdiction obtains in this suit. The City of Houston is the admitted agency of the State in the exercise of the general police power. The question is therefore, should not a Three-Judge Court have been convened to hear this suit?

Specification of Errors

The United States Court of Appeals for the Fifth Circuit erred:

1. In holding that the municpal golf courses of the City of Houston, Texas, are a facility separate and apart from the municipal parks in which the courses are located.

2. In holding that the failure to allow negroes to use golf courses located in municipal parks set aside for white people is a discrimination against negroes.

3. In holding that this case did not require the assembling of a three-judge court.

Reasons For Granting The Writ

I.

This petition presents to this Court a question of peculiar gravity and general importance. In total disregard of the admitted fact that the general recreational facilities offered by the City of Houston for whites and negroes alike afford substantially equal facilities for both races, the Court of Appeals has adopted the arbitrary and artificial position taken by the Respondents that if negroes are not allowed to play a certain game, discrimination exists. The Court has chosen to ignore all other factors in this case except the claim made by the Respondents, and has not even stated in its opinion what the evidence is concerning the recreational facilities afforded to all races in Houston.

The course adopted by the Court of Appeals and its resultant holding has removed from the Petitioners the exercise of any reasonable discretion and judgment in providing public recreational facilities of substantial equality to all races in such manner that such facilities may best serve all the public. The sweeping generality of the opinion is of such confusing and contradictory nature that the very ground upon which it is purportedly based is in conflict with the judgment finally pronounced. The court below says:

"What was accomplished here under the purported sanction of state law is the very thing the Constitution was written to make impossible, and the civil rights statutes forbid. This denying to a negro, because he is a negro, his individual, his personal, right as a citizen to use and enjoy a facility furnished at the public expense while permitting a white man, because he is white, to use and enjoy it." (193 F. 2d 384, 387; R. 98)

But the Court also commands the District Court to afford these Petitioners a reasonable opportunity to promptly prepare and put into effect regulations for the use of the municipal golf facilities, which, while preserving segregation, will be in full and fair accord with its principle. It is impossible to reconcile the two holdings in their over-all application. The Petitioners, in the exercise of the public policy of the State of Texas, have set apart recreational facilities for the white race and the negro race in the parks except as to one major activity, the zoo, which is unsegregated. If the Respondents, because they are negroes, are entitled to assert their right to use a prohibited park simply because it contains one game, why can they not assert it with respect to any other game at any park? And how, in the face of such a holding on segregation as the Court below has made, can the Petitioners segregate a negro playing any certain game? How can these Petitioners preserve segregation in full and fair accord with its principle when the Court of Appeals has announced that the principle of segregation itself denies to the negro as an individual a personal right?

In effect, the Court below is saying: "If there is segregation, the facilities must be substantially equal but the facilities cannot be equal if there is segregation."

The record shows that, out of the more than 600,000 people inhabiting the City of Houston, approximately 500 negroes desire to play golf. Under the doctrine announced by the Court of Appeals, the municipal authorities of Houston cannot take into account that a small group of negroes comprising less than 1/1200th of the population desire to play golf. This in spite of the fact that the record shows, that within the limit of funds which have heretofore been allocated for park and recreational purposes, in order to achieve success, *public recreational activities and the use of public parks must benefit the greatest number from all ages of life, but particularly young people.* (R. 44)

Those facts are undisputed and stipulated. Public recreational facilities are wasted if they do not benefit the greatest number from all ages of life and particularly young people. Any Court which does not exist in a judicial vacuum knows that golf is not a recreational facility designed and laid out for the greatest number or particularly for young people. Because of the expense attendant upon it, it is not a game generally indulged in by the public and certainly not those members of the public who have limited funds for recreation. Golf has not been provided in negro parks because it is not needed nearly as much as those parks need the other abundant recreational facilities which have been furnished.

Many recreational activities are carried on in the public parks within the City, with continuous supervision by trained personnel. For example, Emancipation Park, used exclusively by negroes, has a modern, large and well-equipped gymnasium-auditorium building which is far superior to those in almost any other park in the City (Record, p. 42; Stipulation 12). Finnegan Park, reserved by negroes by policy, has the largest and best equipped swimming pool

in any park in Houston (Record, p. 43; Stipulation 12). Both parks named above also have lighted softball diamonds, picnic areas, play apparatus, and ample space in the gymnasium-auditorium buildings where dances, social gatherings and various other activities are held (Record, pps. 42-43; Stipulation 12). In the opinion of Mr. Koehn, who has been associated with public parks and recreational activities for twenty-six years, Finnegan Park is one of the best equipped parks for negroes anywhere in the United States (Record, p. 43 Stipulation 12).

Hermann Park, Memorial Park and Glenbrook Park (white parks) around which this suit arose, *are not equipped with gymnasium-auditorium recreational buildings* (Record, p. 43; Stipulation 12). Other than the golf courses, these parks are equipped *only* for baseball or tennis, except Memorial Park, which has both (Record, p. 43; Stipulation 12). Only two parks used by white residents are equipped with swimming pools, and according to Mr. Koehn, Emancipation and Finnegan Parks are equal to or superior in these facilities (Record, p. 43; Stipulation 12).

In 1947, the City of Houston commenced a program of improvement in its public parks which has continued to the present time. During 1947, 1948 and 1949, the City appropriated out of the Park Permanent Improvement Bond Fund the vast sum of $1,302,890.00, with Finnegan Park and Emancipation Park receiving more than their pro rata share (Record, p. 43; Stipulation 12). *Of this money, $347,800.00 went for unsegregated facilities, $307,815.00 for parks reserved for negro use.*

Petitioners know of no particular constitutional right which attaches to the game of golf over any other recreational facility. If golf is to be singled out as a game to which in-

dividual civil rights attach, why not baseball, football, tennis, handball, basketball, mumblety-peg or square dancing? The argument of the Court below is forced and artificial. Constitutional segregation is applied to the *places* where the races might commingle in public recreational activities and not to the games conducted in those places, for otherwise segregation has no meaning. It is the commigling of the races in certain places and the danger of clashes resulting therefrom that dictate the policy of segregation. *To say that a place may be segregated but that an activity conducted on it cannot be segregated is to make a farce of the law.*

Respondents have not attempted to make any showing whatsoever of any actual discrimination against them in the furnishing of all public facilities for recreation. They cannot do so. They have chosen to select one game and assert a constitutional right to play it on a park reserved for white people and choose to disregard the fact that the overwhelming majority of their race in Houston is afforded public recreation equal or superior to those afforded white persons.

It becomes impossible for any administrative official to know when an honest attempt at constitutional segregation becomes an unlawful discrimination. If segregation is to remain an instrument of public policy, there must rest in the hands of just administrators an informed and equitable discretion in its application. If segregation is to go, it must go as the result of a new thinking by all the people brought on by the improved relation of the races and not by artificial twisting of the Constitution to meet certain individual ideas of abstract social philosophy. The right of equality is individual, it is true, but it is a right of substantial equality and not such a fanciful and artificial right as that claimed by the Respondents in this case. *So long as public policy employs constitutional segregation as its instrument, Re-*

spondents cannot claim unconstitutional deprivation of rights merely because of segregation.

No case previously presented to the Courts has presented the question of the over-all substantial equality of recreation afforded the races. The case of LAW v. MAYOR AND CITY COUNCIL, 78 F. Supp. 346 (D.C. Md., 1948), cited by the Court below, presented no question except the golf course itself. No facts were presented to show that substantially equal recreational rights were afforded the negroes as a whole. RICE v. ARNOLD, 340 U.S. 848 (1950), concerned one golf course alone and did not raise the question raised here. The same is true of DURKEE v. MURPHY, 29 A. 2d 253 (Md. Ct. App. 1943). Even in the latter case, the Court recognized that the requirements of equality can be refined too far, although the Court was only considering a golf course question without regard to the over-all recreational picture.

The segregation imposed by law in this case is not a recent expression of the Petitioners or of their many predecessors. It has existed generally in this State for generations. As public officials, Petitioners are the elected representatives of the whole people, and express not their own views, but the views of the general community in this legislation. There is a duty to all individuals to preserve public order and to prevent racial strife and hatred, as well as a duty to the individual to protect personal rights. That duty is legislative and rests with the whole body of the people. When a court invades that province under the guise of protecting a "constitutional right" when no substantial inequality exists, then the court is usurping a primary legislative function.

II.

Respondents asked that a permanent writ of injunction be granted, and that Article 1015b of the REVISED CIVIL

STATUTES OF TEXAS, and Ordinance 1434 of the City of Houston be declared unconstitutional. Petitioners contend that such prayer brings this case within those requiring a Three-Judge Court. (28 U.S.C.A. 2281.)

It is pertinent here to consider the background of the special Three-Judge Court. The most obvious and moving reason was and is to provide a method of procedure in cases where a State statute is involved so that the actions of *one judge* may not disrupt the enforcement and execution thereof. Second, such procedure provides a speedy method of appeal, in order that the question may be finally settled without resorting to the lengthy route involved in other cases. In short, Section 2281 guards against arbitrary and time wasting procedures which might disrupt unnecessarily an entire segment of the laws of a State.

Against this background, the Amended Petition of Respondents shows on its face that they desire a State statute to be declared unconstitutional. In the absence of that or some similar allegation relating to State action, the District Court would have had no jurisdiction. Civil Rights Cases, 109 *U.S.* 3 *(1883). The action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.* SHELLEY v. KRAEMER, 334 U.S. 1 (1948).

Had the District Court granted the demand of the Respondents and declared Art. 1015b unconstitutional, it is apparent that such action would have affected seriously its enforcement on a statewide basis, without any fast means of appeal reserved to Petitioners. With the preceding statements in mind, we urge that this case required the assembling of a Three-Judge Court.

Article 1015b is not merely an "enabling statute", as the caption of the Act demonstrates:

> *"An Act providing for the segregation or separation of the white and negro races and providing for the conferring of power and authority upon cities to pass suitable ordinance controlling the same and providing for fixing the penalty and declaring an emergency."* (Acts 1927, 40th Leg., p. 154, ch. 103, LAWS OF TEXAS.)

Thus, it is seen that the statute embodies a state-wide policy of segregation of the races, and is not merely "permissive" legislation involving residential segregation. In compliance with such state-wide policy, and under authority given by the statute, segregation in parks was adopted in Houston.

The City of Houston is a municipal corporation and bases its very existence upon power conferred by the State of Texas. As is admitted in the pleading of Respondents, *the City of Houston is an agent of the State,* and acts by authority found in its charter and in the general and special laws of Texas (Record, p. 8, Par. 4). Further, the Respondents have asked that the State statute be declared unconstitutional (Record, p. 19, Par. 17(d)). Therefore, it is quite evident that Respondents' action seeks to restrain the enforcement, operation, and execution of a State statute upon the ground of unconstitutionality, and that the questioned statute announces a state-wide policy of segregation within cities.

In the enactment and enforcement of Ordinance 1434, the Petitioners were performing a State function of state-wide concern, and should be construed as State officers for purposes of Section 2281. The case of CITY OF CLEVELAND v. UNITED STATES, 323 U.S. 329 (1944) is analogous to the one at bar. The cited case involved city and county taxing officials in the execution of a State statute; and in the instant case, Petitioners are city officials in the execution of a State statute, and municipal ordinance based thereon, relating to segregation.

It is not the formal status of the officials sued, but the sphere of their functions concerning the matter which is determinative of the issue. RORICK v. BOARD OF COMMISSIONERS, 307 U.S. 208 (1939). In a suit involving the administration of affairs of a drainage district, which the court held to be a matter of local concern based on local legislation, the Court said (307 U.S. 212):

> "An official though localized by his geographic activities and the mode of his selection may, when he enforces a statute which 'embodies a policy of state-wide concern', be performing a state function within the meaning of Section 266."

In the case at bar, the Petitioners are performing a State function within the requirements stated above, in that they are enforcing a statute of state-wide application and the policy of that statute. SPEILMAN MOTOR SALES CO. v. DODGE, 295 U.S. 89, 94-95 (1935).

Under the CONSTITUTION OF TEXAS, Art. III, Section 35, the subject of a bill must be expressed in its title, and it is evident that the title or caption of Art. 1015b announces a state-wide policy of segregation within cities, and is not directed merely to residential segregation. In the enforcement of this statute, the City has enacted Ordinance 1434, which the Petitioners contend is the exercise of a State function.

The requirements of a Three-Judge Court under 28 U.S.C. 2281 are present in that appellees are enforcing a statute of state-wide application by means of an ordinance, which enforcement Respondents seek to restrain upon the ground of unconstitutionality. Therefore, Petitioners' request for a Three-Judge Court should have been granted.

Conclusion and Prayer

For the foregoing reasons, Petitioners pray that a writ of certiorari be granted, the judgment of the Court of Appeals reversed and that of the District Court affirmed.

Respectfully submitted,

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